

**Pacific Lincoln-Mercury, Inc. and International Association of Machinists and Aerospace Workers, District Lodge 160, Local Lodge 289, AFL-CIO, Petitioner.** Case 19-RC-12664

September 30, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered determinative challenges in and objections to an election held March 9, 1993, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 14 for and 12 against the Petitioner, with 3 determinative challenged ballots.<sup>1</sup>

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings only to the extent consistent with this Decision and Order.

1. The Board agent challenged the ballot of Jeff Pashby because his name was not on the *Excelsior*<sup>2</sup> list of eligible voters. The hearing officer found that Pashby was eligible to vote as a dual-function employee and recommended that the challenge to his ballot be overruled. The Employer excepts, contending that Pashby is not a part of the stipulated unit and further contending that Pashby is not properly includable in the unit as a dual-function employee. We find merit in the Employer's exception.

In stipulated unit cases, the Board's function is first to ascertain the parties' intent with regard to the disputed employee and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. *Tribune Co.*, 190 NLRB 398 (1971). If the objective intent of the parties is expressed in the stipulation in clear and unambiguous terms, the Board holds the parties to their agreement. *Gala Food Processing*, 310 NLRB 1193 (1993), citing *Tribune Co.*, *supra*.

Here, the stipulated unit includes "[a]ll full-time and part-time Service and Parts Department employees" and excludes "all other employees."<sup>3</sup> It is undisputed that Pashby is not part of the service and parts depart-

ment, but rather is employed as a mechanic in what is clearly identified in the record as a separate department of the Employer—the used-car department. There is no evidence that the parties intended to include used-car department employees in the stipulated unit. Therefore, we find that it was the clear intent of the parties to confine the stipulated unit to service and parts department employees and to exclude individuals such as Pashby who work in other departments. We also find that the exclusion of Pashby does not violate any statutory provision or settled Board policy. Accordingly, we reverse the hearing officer and sustain the challenge to Pashby's ballot.<sup>4</sup>

2. The Petitioner filed four objections to the election.<sup>5</sup> Objection 4 alleges that Parts Manager Gary Smith threatened and coerced employees by telling them that if they voted for the Union, they would lose their current wages, medical benefits, and retirement benefits, and they would have to start from scratch.

Smith testified that in the course of a discussion about the consequences of the Union winning the election, he told employees, *inter alia*, that the starting point of negotiations would be zero. Smith did not controvert employees' testimony that he drew a picture of a zero with a line drawn through it to illustrate his point. Based on this, without making any further credibility determinations, the hearing officer recommended that Objection 4 be sustained.

We cannot agree that this objection can be disposed of in such a summary fashion. The hearing officer's approach overlooks substantial relevant testimony in the record. For example, Smith also testified that he told employees that "everything would go on the table for some type of negotiation and it was not a guarantee that you would not get more, less. It could go any way." The hearing officer failed to credit or discredit this testimony, although elsewhere in his report with

<sup>4</sup>See *Southwest Gas Corp.*, 305 NLRB 542, 543 fn. 7 (1991) ("when parties stipulate to language that refers to objectively identifiable divisions within an employer's organization, they should be bound by that objective description").

Moreover, we note that even if we were to find the objective intent of the parties to be ambiguous, Pashby would still not be eligible to vote as a dual-function employee. Under the Board's decision in *Berea Publishing Co.*, 140 NLRB 516, 518-519 (1963), a dual-function employee who is "regularly employed for sufficient periods of time [in unit work] to demonstrate . . . a substantial interest in the unit's wages, hours, and conditions of employment" is included in the unit. The hearing officer determined that prior to the election Pashby spent approximately 5 to 10 percent of his time performing unit work. This is not sufficient to establish that Pashby is regularly engaged in performing unit work within the meaning of *Berea*. See *Manhattan Construction Co.*, 298 NLRB 501, 502 (1990) (challenge to Pepper's ballot).

In agreeing with his colleagues on this point, Member Raudabaugh notes that Pashby would not be eligible under the 50-percent test set forth in Member Raudabaugh's dissenting opinion in *Avco Corp.*, 308 NLRB 1045 (1992).

<sup>5</sup>In the absence of exceptions we adopt pro forma the hearing officer's recommendations that Objections 1, 2, and 3 be overruled.

<sup>1</sup>In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that the ballots of Robert Childs and Mike Farrell be opened and counted.

<sup>2</sup>*Excelsior Underwear*, 156 NLRB 1236 (1966).

<sup>3</sup>The stipulated unit description reads in full as follows:

All full-time and part-time Service and Parts Department employees, including all automotive mechanics, technicians, countermen, service porters/drivers, and shipping and receiving employees employed at the Employer's Seattle, Washington facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

respect to a different objection he found Smith to be a candid witness.

In addition, the hearing officer failed to comment on the testimony of employee Otto Hovorka who claimed that Smith coupled his bargaining comment with what would appear to be a clearly coercive threat of loss of benefits. Thus, Hovorka testified that Smith said that “if you guys into union [sic] . . . you are going to lose all your benefits and you are going to start from scratch.”

“The Board has held that . . . ‘hard bargaining’ statements [such as ‘bargaining from scratch’] may or may not be coercive, depending on the context in which they are uttered.” *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977). What is missing from the hearing officer’s report is a resolution of the conflicting testimony on the critical issue of the context surrounding the statement in issue here.

Accordingly, if after the ballots of Robert Childs and Mike Farrell are opened and counted, the Petitioner has not received a majority of the ballots cast, we direct that the hearing officer shall make further credibility determinations and prepare a supplemental report and recommendations based on those determinations. The credibility determinations should specifically address the testimony of employees Otto Hovorka,

Douglas Taylor, and Mike Farrell, as well as all the testimony of Gary Smith in its entirety, concerning this objection in order to determine exactly what Smith said on what occasions and within what context.

#### ORDER

IT IS ORDERED that the Regional Director for Region 19 shall, pursuant to the Board’s Rules and Regulations, within 14 days from the date of this Decision and Order, open and count the ballots of Robert Childs and Mike Farrell and cause to be served on the parties a revised tally of ballots. Should the revised tally show that the Petitioner has received a majority of the ballots cast, the Regional Director shall issue a Certification of Representative.

IT IS FURTHER ORDERED that should the revised tally show that the Petitioner has not received a majority of the ballots cast, the proceeding shall be remanded to the hearing officer for additional findings in accordance with this Decision and Order.

IT IS FURTHER ORDERED that the hearing officer shall prepare and serve on the parties a supplemental report and recommendation. Following service of the supplemental report on the parties, the provisions of Section 102.69 of the Board’s Rules and Regulations shall be applicable.